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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

PR 23 2004

FILE:

Office: EL PASO, TEXAS

Date:

IN RE:

Applicant:

APPLICATION:

Application for Certificate of Citizenship pursuant to section 301 of the Immigration and Nationality Act, 8 U.S.C. § 1401.

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, El Paso, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant was born on March 11, 1966, [REDACTED]. The record indicates that the applicant's mother, [REDACTED] was born in Colorado, Texas on March 7, 1928, and that she was a United States citizen. The applicant's father, [REDACTED] was born in Mexico, and he became a U.S. citizen in November 1999. The applicant's parents were married on November 15, 1946, in Chihuahua, Mexico. The applicant seeks a certificate of citizenship pursuant to section 301 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1401, based on the claim that he acquired U.S. citizenship at birth through his mother.

The district director found that the applicant had failed to establish his mother was physically present in the United States for 10 years prior to his birth, at least 5 years of which occurred after she reached the age of 14. The district director noted that he had requested documentary evidence from the applicant to establish that the applicant's mother was physically present in the United States, and that no such evidence had been provided. The application was denied accordingly.

On appeal, counsel asserts that the evidence contained in the record is consistent and that it reasonably establishes that the applicant's mother (Ms. [REDACTED]) was physically present in the United States for the requisite time period under section 301 of the Act.

"The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." *Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1029 (9th Cir., 2000) (citations omitted). The applicant in this case was born in Mexico in 1966. Thus, the version of section 301 of the Act that was in effect at that time (section 301(a)(7)) controls his claim to derivative citizenship.

In order to derive citizenship pursuant to section 301(a)(7) of the former Immigration and Nationality Act (former Act), it must be established that when the child was born, the U.S. citizen parent was physically present in the U.S. or its outlying possession for 10 years, at least 5 of which were after the age of 14. *See* § 301(a)(7) of the former Act.

In *Matter of V*, 9 I&N Dec. 558, 560 (BIA 1962), the Board of Immigration Appeals determined that the term "physical presence" meant "continuous physical presence" or "residence" in the United States. In order to meet the physical presence requirements as set forth in section 301(a)(7) of the former Act, the applicant must establish that his mother was physically present in the U.S. for ten years between March 7, 1928, and March 11, 1966, and that five of those years were after March 7, 1942, when his mother turned 14.

The evidence pertaining to Ms. [REDACTED]'s physical presence in the United States between March 7, 1928 and March 11, 1966, consists of the following documents:

A Texas birth certificate reflecting that Ms. [REDACTED] was born in Colorado, Texas on March 7, 1928;

A Baptism certificate issued on June 1, 1967, reflecting that [REDACTED] was baptized at the Church of Saint Ann in Colorado City, Texas on March 7, 1928;

A 1930 Census Bureau record reflecting that Ms. [REDACTED] lived in Odessa, Texas on April 1, 1930;

A notarized affidavit dated March 1, 2001, written by the applicant's father, [REDACTED] stating that Ms. [REDACTED] resided in Texas from 1953 to 1965;

An unnotarized affidavit dated August 15, 2001, written by Father [REDACTED] stating that Ms. [REDACTED] was a member of the St. Joseph Catholic Church in Odessa, Texas between 1960 and 1965;

An unnotarized and undated affidavit, written by Father [REDACTED] stating that Ms. [REDACTED] lived in Presidio, Texas between 1953 and 1957, and that she attended mass at the Santa Teresa de Jesus Church whenever possible;

A notarized affidavit, dated March 8, 2001, written by [REDACTED] stating that Ms. [REDACTED] resided in Texas between 1953 and 1965, and that Ms. Madrid worked for the affiant's cousin [REDACTED];

A notarized affidavit, dated February 12, 2001, written by [REDACTED] stating that Ms. [REDACTED] worked for her on a ranch in Redford, Texas, between 1955 and 1959;

A notarized affidavit, dated February 13, 2001, written by [REDACTED] stating that Ms. [REDACTED] worked for her father, [REDACTED], in Odessa, Texas, between approximately February 1960 and November 1965;

A notarized affidavit, dated February 11, 2001, written by [REDACTED] stating that he knew Ms. [REDACTED] when she lived and worked in Texas between 1953 and 1959;

A notarized affidavit, dated January 9, 2001, written by [REDACTED] stating that she knew Ms. [REDACTED] while she was living and working in Texas between 1953 and 1959;

A notarized affidavit, signed January 10, 2001, written by [REDACTED] stating that Ms. [REDACTED] was her neighbor at 511 Sam Houston in Odessa, Texas between 1960 and 1963, and stating that Ms. [REDACTED] was her roommate at 1328 S. Washington in Odessa, Texas in 1964;

A photo claiming to depict the applicant's mother in Texas in July 1939.

8 C.F.R. § 103.2(b)(2) states, in pertinent part:

(2) *Submitting secondary evidence and affidavits* – (i) *General*. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petitions who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary

evidence.

(ii) *Demonstrating that a record is not available.* Where a record does not exist, the applicant or petitioner must submit an original written statement on government letterhead establishing this from the relevant government or other authority. The statement must indicate the reason the record does not exist, and indicate whether similar records for the time and place are available.

As noted in the district director's decision, the only documentary evidence contained in the record consists of Ms. [REDACTED] 1928, birth certificate and baptismal certificate, and the 1930 Census Bureau record. The AAO finds that these documents establish that Ms. [REDACTED] was a U.S. citizen and that she was physically present in the United States between 1928 and 1930.

The AAO notes that on August 6, 2001, the district director requested that the applicant submit additional documentation to establish that his mother was physically present in the U.S. during the requisite time period, such as Social Security earnings, school attendance records, state or federal identification documents, income tax, medical or insurance records, and bank account, housing or church records. None of the requested documentation was provided. Instead, counsel submitted numerous affidavits on appeal stating that Ms. [REDACTED] resided in the U.S. between 1953 and 1965. The AAO notes that neither the applicant nor counsel provided evidence that the requested documents were not available, and the record contains no explanation as to why the documents were not submitted.

The AAO finds that the affidavits submitted on appeal do not address or overcome unavailability of primary and secondary evidence relating to Ms. [REDACTED] physical presence in the U.S. after 1930. The AAO notes further that the affidavits submitted on appeal contain no supporting evidence or information to substantiate their claims. The record does not contain corroborating church or employment record documentation. The record also contains no documentary evidence to establish that Ms. [REDACTED] owned, rented or leased a home in the United States. In addition, the affidavits lack basic and material details regarding exact dates that the applicant's mother resided in the United States, and regarding the source of the affiants' knowledge of Ms. [REDACTED] residence in the United States between 1953 and 1965. The AAO additionally notes that the copy of a photo allegedly depicting the applicant's mother in Texas in July of 1939, lacks probative value, as it is impossible to determine who is in the photo or where it was taken, and it provides no information or evidence pertaining to Ms. [REDACTED] actual residence in Texas.

The AAO finds that the applicant has failed to establish his mother was physically present in the United States for the requisite time period. The applicant has therefore failed to establish that he is entitled to derivative U.S. citizenship pursuant to section 301(a)(7) of the former Act.

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. *See also* § 341 of the Act, 8 U.S.C. § 1452. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.